RECENT DEVELOPMENT

*George Watts & Son v. Tiffany & Co.**

I. INTRODUCTION

Employers have generally rejoiced over the *Gilmer v. Interstate/Johnson Lane Corp.*[1] decision that upheld the right of employers to utilize arbitration agreements to settle a wide range of workplace disputes from employment discrimination issues to contractual disputes. Employers, and other supporters of arbitration have long maintained that arbitration is a much more affordable and expedient method of resolving workplace disputes than traditional litigation. There is a dark side to arbitration, and that is whether parties to arbitration should be bound by the terms of an arbitration award when the arbitrator has clearly disregarded the law or has violated some basic public policy tenets. In other words, should the federal courts be able to intervene and vacate arbitration awards when the arbitrator displays a "manifest disregard" of the law?

The answer to that question is far from clear, and a recent decision, *George Watts & Son v. Tiffany & Co.*,[2] appears to answer that question in the negative. The unique holding in this case seems to have bolstered the premise that arbitrator decisions should stand unless the arbitrator clearly orders the parties to violate the law. The Seventh Circuit in this case uses a far different analysis than other circuits, stated that an arbitrator's decision cannot be vacated for manifest disregard provided that the arbitrator has the same power to act as would the parties themselves if left to their own devices.[3] In other words, the arbitrator is acting as an agent of the parties and, as such, his/her only obligation is to fashion an award that the parties could have created on their own.[4]

This is the first time that any circuit court has applied agency theory to the concept of manifest disregard. The Seventh Circuit has managed to turn judicial attention from issues of law to the relationship of the arbitrator to the parties. Certainly, this is a less troublesome and less taxing analysis for the court as to whether the arbitrator has committed manifest disregard. However, this approach flies in the face of other circuits' understanding and application of the manifest disregard doctrine. In order to better understand

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* 248 F.3d 577 (7th Cir. 2001).

[1] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[2] George Watts & Son v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001).

[3] *Id.* at 580.

[4] *Id.* at 580–81.

the unique nature of this decision, it is necessary to examine briefly the judicial history of manifest disregard.

II. HISTORICAL OVERVIEW OF MANIFEST DISREGARD

Arbitration was statutorily sanctioned through the Federal Arbitration Act that provided for very specific reasons to vacate an arbitration award in 9 U.S.C. § 10. Specifically, section 10 states that the award may be vacated by the federal courts,

> (1) Where the award was procured by corruption, fraud, or undue means;
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> (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or for any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[5]

The federal courts have no problem in vacating an arbitration award when one of these provisions has been violated, but these cases are few and far between. Far more likely to arise are cases in which the arbitrator has not committed an overt example of outrageous behavior, but the award itself seems to run contrary to existing law. Such is the case with manifest disregard.

Manifest disregard is almost universally thought of as a non-statutory basis for vacating an arbitration award. It was first articulated as such by *Wilko v. Swan*,[6] a case dealing with securities fraud. The doctrine was articulated through dicta,[7] and although the case was later overturned on

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[5] Federal Arbitration Act, 9 U.S.C. § 10 (2000).

[6] Wilko v. Swan, 346 U.S. 427 (1953), *rev'd on other grounds,* 201 F.2d 439 (2d Cir. 1953).

[7] The dicta from *Wilko* reads,

> While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of [relevant law] would "constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions [to arbitration] . . . the

other grounds, the manifest disregard dicta remained. Today, all but the Fifth Circuit recognize the doctrine as a non-statutory basis for vacating arbitration decisions.[8] Even though almost all of the circuits agree that manifest disregard is a non-statutory basis for reviewing an arbitration case, it is very unclear from the dicta as to how the courts should apply the standard.[9] The circuit courts range in their willingness to apply the doctrine as well as how the court should go about determining whether manifest disregard has occurred.

Two circuits stand out from the rest because they represent the endpoints of the continuum that is manifest disregard—the Second Circuit and the Eleventh Circuit. The Eleventh Circuit, while recognizing the manifest disregard doctrine, is reluctant to apply the concept in all but the most rare of circumstances.[10] The court was adamant that manifest disregard went beyond mere misinterpretation of the law. It was the court's view that the actual record must show that the "arbitrators knew the law and expressly disregarded it."[11]

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interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in federal courts, to judicial review for error in interpretation.

Id. at 436–37 (citation omitted).

[8] Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1460 (11th Cir. 1997). The court said, "Thus, every other circuit except the Fifth (which has declined to adopt any non-statutory grounds for vacating arbitration awards), has expressly recognized that 'manifest disregard of the law' is an appropriate reason to review and vacate an arbitration panel's decision." *Id.* (citing Barnes v. Logan, 122 F.3d 820 (9th Cir. 1997); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9 (2d Cir. 1997); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844 (6th Cir. 1996); Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234 (1st Cir. 1995); United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376 (3d Cir. 1995); Nat'l. Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957 (7th Cir. 1993); McIlroy v. PaineWebber, Inc., 989 F.2d 817, 820 n.2 (5th Cir.1993); Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225 (4th Cir. 1991); Lee v. Chica, 983 F.2d 883 (8th Cir. 1993); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631 (10th Cir. 1988)).

[9] Adam Milam, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law*, 29 CUMB. L. REV. 705, 705–06 (1999).

[10] Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992).

[11] Gary W. Flanagan, *Expanded Grounds for Judicial Review of Employment Arbitration Awards*, 67 DEF. COUNS. J. 488, 491 (2000) (citing Robbins v. Paine Webber Inc., 954 F.2d 679, 683 (11th Cir. 1992) (quoting O.R. Sec. Inc. v. Prof'l Planning Assoc., 857 F.2d 742, 747 (11th Cir. 1988)).

III. REJECTION OF MANIFEST DISREGARD AND THE ELEVENTH CIRCUIT

The Eleventh Circuit's definition of manifest disregard was realized in the case *Montes v. Shearson Lehman Brothers.*[12] Delfina Montes had worked as a Sales Assistant at the Hallendale branch of Shearson. She regularly worked over forty hours a week. Eventually, she ceased working for Shearson and demanded overtime payments that were due her. Shearson refused saying that she was an exempt employee and thus not entitled to overtime. There was ample evidence and testimony to establish that Montes was regarded as a non-exempt employee for Fair Labor Standards Act (FLSA) purposes. She had no supervisory duties, she filled out a time card which was only required of non-exempt personnel, and even Shearson's internal documents identified her as a non-exempt employee.[13] Shearson countered that she had supervisory duties and was thus exempt from overtime, although the evidence was slim that this was the case.[14] Shearson stated that while she may not have officially been classified as an exempt employee, they considered her to be exempt from the provisions of the FLSA. The case was originally heard in district court, but Shearson moved to have the case moved to arbitration since Montes had signed an arbitration agreement at the start of her employment with Shearson. The case was arbitrated and the arbitrators found in favor of Shearson.

Montes brought her claim to the Eleventh Circuit claiming that the arbitrators had manifestly disregarded the law in making their decision—in this case, the FLSA. Even more interesting was the reason behind the arbitrators' departure from the concerns of the FLSA. Shearson's lawyer made explicit pleas to the panel to ignore the law. As bold as that request may seem, what was even more surprising was that the panel decided to do just that—ignore the FLSA provisions for exempt and non-exempt personnel.[15] Granted, the arbitrators were not attorneys, but it still is

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[12] Montes v. Shearson Lehman Bros., 128 F.3d 1456 (11th Cir. 1997).

[13] *Id.* at 1463. Even Montes' nameplate read "Sales Assistant."

[14] *Id.* at 1463–64.

[15] Shearson's closing statement was as follows:

> You have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just and equitable in this case. I know it's hard to have to say this and it's probably even harder to hear it but *in this case this law is not right.* Know that there is a difference between law and equity and I think, in my opinion, that difference is crystallized in this case. *The law says one thing. What equity demands and requires and is saying is another.* What is right and fair and proper in this? *You know as arbitrators you have the ability; you're not strictly bound by case law and*

shocking that any arbitrator would seriously consider it proper to ignore the law.

The Eleventh Circuit agreed. While extremely reluctant in the past to apply the manifest disregard doctrine, the facts in *Montes* were so extreme and clear that the court had very little trouble in vacating the award. It is highly unlikely that similar circumstances will show themselves in the same way as they did in *Montes*. It was the court's opinion that the arbitrators acted in an "arbitrary and capricious" fashion and with a "manifest disregard" of the law that constituted grounds for vacating the arbitration award. An arbitrator was arbitrary and capricious if "a ground for the arbitrator's decision cannot be inferred from the facts of the case."[16] The *Montes* case was a manifest disregard case since the decision demonstrated that the arbitrators were "[c]onscious of the law and deliberately ignore[d] it."[17] The record itself was used as evidence that the arbitrators had committed manifest disregard.[18]

The importance of the Eleventh Circuit's "arbitrary and capricious" standard or its use of "manifest disregard" is that plaintiff's burden of proof is set extremely high. The court presumes from the beginning that the arbitration award is correct and will only be vacated "if there is no ground whatsoever for the decision."[19] This would seem to suggest that even if there is only a thread of justification, the arbitration award would stand. *Montes* was one such case where the plaintiff's burden of proof was met. The court

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precedent. You have the ability to do what is right, what is fair and what is proper, and that's what Shearson is asking you to do.

Id. at 1459 (citation omitted).

The attorney continued this theme upon closing, "thus, as I said in my Answer, as I said before in my Opening, and I now ask you in my Closing, not to follow the FLSA if you determine she's not an exempt employee." *Id.*

[16] Flanagan, *supra* note 10, at 491–92 (quoting Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992)).

[17] *Montes*, 128 F.3d at 1461.

[18] The court made it clear as to why they decided to apply the manifest disregard standard in this case when they so rarely applied it in other cases:

> We apply it here because we are able to clearly discern from the record that this is one of those cases where manifest disregard of the law is applicable, as the arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal. Thus, there is nothing in the record to refute the suggestion that the law was disregarded. Nor does the record clearly support the award.

Id. at 1462.

[19] Flanagan, *supra* note 10, at 492 (quoting Lifecare Int'l Inc. v. CD Med. Inc., 68 F.3d 429, 435 (11th Cir. 1995), *opinion modified and supplemented on other grounds*, 85 F.3d 519 (11th Cir. 1996)).

was faced with a truly "arbitrary and capricious" set of circumstances, and the plaintiff met the difficult burden of proof.

The Eleventh Circuit decision focuses on the explicit statements made by Shearson's attorney to ignore the law.[20] Given the outcome of the award, it was clear that the arbitrators had agreed to do so. It is not likely in the future that the Eleventh Circuit will review manifest disregard cases as it had in *Montes*, much less embrace the concept of manifest disregard as has the Second Circuit.

IV. THE SECOND CIRCUIT AND MANIFEST DISREGARD

One of the most active circuits that fully supports manifest disregard is the Second Circuit. The Second Circuit has always strongly advocated the doctrine and takes a more liberal stance on the burden of proof that must be met. Rather than requiring the plaintiff to shoulder the burden, the court seems to take on the task of determining whether the facts, as presented, warrant the arbitration award that was given. Another important hallmark of this circuit is its view of manifest disregard as being a statutory, rather than non-statutory reason for vacatur. The court has held that the *Wilko* dicta should be interpreted as a violation of Section 10(d) of the Federal Arbitration Act.[21] When the arbitrator has clearly exceeded his statutory authority, the court is statutorily permitted to intercede and vacate the award.[22] However, the court was still left with the problem of deciding whether the arbitrator had merely interpreted the contract or was in willful violation of the law. The court settled on a definition of manifest disregard whereby the arbitrator clearly knew the law, yet deliberately failed to follow it.[23] Later the court added that a reasonable person, trained as an arbitrator, should be able to discern whether the error had been committed.

Judge Feinberg was instrumental in defining the manifest disregard doctrine for the Second Circuit. His interpretation of manifest disregard began in *DiRussa v. Dean Witter Reynolds, Inc.*,[24] where it was decided that the arbitrator had to do something more than just commit a legal error or misrepresentation.[25] As a result, cases involving manifest disregard had to show "(1) the arbitrators knew of a governing legal principle yet refused to

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[20] *Montes*, 128 F.3d at 1461.

[21] Flanagan, *supra* note 10, at 490 (citing Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960)).

[22] *Id.*

[23] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933–34 (2d Cir. 1986).

[24] DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997).

[25] *Id.*

apply it; and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable."[26] While *DiRussa* did not result in a vacation of the award, it served as the basis for another decision that would surprise the legal community, *Halligan v. Piper Jaffray*.[27]

Halligan brought a claim against his employer, Piper Jaffray, for alleged violations of the Age Discrimination in Employment Act (ADEA).[28] Halligan had been employed in 1973 as a salesman of equity investments to financial institutions.[29] At the time of his employment, he was required to sign an arbitration agreement by the National Association of Securities Dealers (NASD) to arbitrate any future disputes.[30] Piper Jaffray terminated Halligan more than twenty years later, allegedly for poor performance on the job. Halligan presented strong evidence during the arbitration that his termination was the result of age discrimination rather than for performance related issues.[31] Several other employees testified that Halligan was "the best in his field" and at one point, Piper Jaffrey had to admit that his performance did not warrant termination.[32] Despite the evidence, the arbitrator found for Piper.

During the proceedings, Mr. Halligan passed away due to poor health, but his widow continued the arbitration proceedings and later, the litigation to vacate the award.[33] The district court upheld the arbitration award,[34] but the Second Circuit reversed.

The Second Circuit agreed that great deference should be given to an arbitrator's award and that review of that award should be conducted only under a number of specific circumstances. However, in acknowledging that, the court still approached the issue of manifest disregard in a unique way—manifest disregard of the evidence.[35] In other words, the court was concerned whether the arbitrators had disregarded the weight of the evidence presented in the arbitration and thus, made a "wrong" decision. In an unprecedented move, the court reviewed the evidence presented at arbitration and then compared that with the decision. It was the court's conclusion that the

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[26] *Id.*

[27] Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998).

[28] *Id.* at 198.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 203.

[33] *Id.* at 198.

[34] *Id.* at 200.

[35] Mark B. Rees, Halligan v. Piper Jaffray: *The Collision Between Arbitral Autonomy And Judicial Review*, 8 AM. REV. INT'L ARB. 347, 347 (1999).

arbitrators had, "ignored the law, or the evidence, or both."[36] The record of the arbitration proceedings left no doubt that the arbitration panel had been clearly advised of the applicable law by the parties' legal counsel so the arbitrators could not claim they had not been sufficiently advised of the law. Since the arbitrators had been fully advised on the law, and, given the considerable evidence which supported Halligan's claim of discrimination, the court held that the arbitration decision would be voided for manifest disregard of the law.[37]

For the first time, a court of appeals intruded upon the arbitrator's role of interpreting the evidence. The court placed itself in the role of the arbitrator and found the arbitrator's interpretation wanting. Never had a court attempted to second-guess the arbitrator's weighing of the evidence. In addition, rather than relying on the plaintiff to meet a burden of proof to the court, the court set the burden on itself—to weigh the evidence. In addition, the court made much of the fact that there was no written decision in this case. A written decision allows the court to understand how the arbitrators viewed the evidence and what led to the decision. While the court repeatedly stated that there is no statutory mandate for arbitrators to render a written decision, the court's actions said something quite different. The court stated that when the outcome of the arbitration decision was at odds with the evidence, the absence of a written agreement would come in as evidence in the determination for vacatur.[38]

The *Halligan* court interfered with the arbitrator's right to assess the credibility of the evidence—a province that before now, had been universally held to be the sole power of the arbitrator. In fact, the court went so far in assessing the "correctness" of the award, that it stated that even if the arbitrators had a written decision, that decision would be ignored since it was the court's opinion that the arbitration award was so contrary to the evidence presented.[39]

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[36] *Halligan*, 148 F.3d at 204.

[37] *Id.*

[38] *Id.* The court did state that while arbitrators were never required to write out their decisions, it would consider such decisions in situations in which the evidence did not clearly match with the arbitration award. *See* Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985); *In re* Andros Compania Maritima, S.A. of Kissavos (Marc Rich & Co., A.G.), 579 F.2d 691, 704 (2d Cir. 1978); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972). However, in *Gilmer*, it was said that even if there were inadequacies in the arbitration forum, those inadequacies should be decided on a case-by-case basis. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42 (1991). The Second Circuit seems to be applying dicta here to future cases regarding the evidentiary merit of a written arbitration decision.

[39] Rees, *supra* note 29, at 356–57.

The Second Circuit's opinion in *Halligan* was so contrary and expansive compared to previous cases, that it was thought by some that the concept of manifest disregard had been so broadened that it would be commonly used to vacate arbitration awards. However, this was not always the case as later cases demonstrated. *Campbell v. Cantor Fitzgerald & Co.*,[40] another Southern District of New York case decided just one year after *Halligan*, foreshadowed what may come to be expected of more and more litigants on the losing end of an employment arbitration decision. While the plaintiff seemed to take the factual approach of the *Halligan* court—attempting to show that the "credibility of the evidence presented" could not be factually shown, the court stated that this "is not a proper basis upon which to vacate the award at issue."[41]

Contrary to what appears to be obvious in *Halligan*, the district judge further stated that, 'Halligan does not stand for the proposition, however, that district courts may reweigh the evidence and second-guess the arbitrators' credibility determinations. Rather, *Halligan* holds that an arbitration award may be set aside if it is in manifest disregard of the law or facts."[42]

V. THE SEVENTH CIRCUIT VIEW OF MANIFEST DISREGARD

The circuit courts have varying ideas regarding manifest disregard, and most revolve around how to determine whether the law has been followed. The resulting debate can be heated, and as one commentator put it, raising the issue of manifest disregard is akin to raising the subject of politics or religion at a dinner party—the results are often intense and explosive. [43]

The Seventh Circuit in *Watts* has added to the debate with yet another perspective on the issue of manifest disregard. The *Watts* court has now removed itself from being principally concerned with determining whether the arbitrator has acted beyond the law or evidence. The focus is now whether the arbitrator has acted as a proper agent for the parties. In other words, the issue is whether the arbitrator created an award that provides the parties with an agreement they would have been able to forge themselves.

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[40] Campbell v. Cantor Fitzgerald & Co., 21 F. Supp. 2d 341 (S.D.N.Y. 1998), *aff'd*, 205 F.3d 1321 (2d Cir. 1999).

[41] Flanagan, *supra* note 10, at 497 (quoting *Campbell*, 21 F. Supp. 2d at 345, 349).

[42] *Id.*

[43] *See* Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 50 (1997).

VI. FACTS AND PROCEDURAL HISTORY OF *WATTS V. TIFFANY*

The Seventh Circuit had, in the past, "unequivocally stated an outright rejection of the [sic] of all non-statutory grounds for vacating an arbitration award, including the "manifest disregard" standard as late as 1991."[44] However, the court also recognized that there are limitations on the arbitrator's authority, "[a]rbitrators do not sit to dispense their own brand of justice."[45] The court seemed to be more open-minded a few years later when it used manifest disregard as a non-statutory ground to vacate arbitration awards.[46] The acceptance did not last long, and the *Watts* case represents not only the rejection of the manifest disregard doctrine, but also a dramatic departure as to how the concept was defined.

The concept of manifest disregard had been applied in a contradictory fashion, so the formulation of manifest disregard in *Watts* was an attempt to pull together those diverse views, while at the same time preserve the relationship of the arbitrator and the arbitration award. The court stated that manifest disregard could only take place if the arbitrator either ordered the parties to violate the law, or required the parties to adhere to an agreement the terms of which the parties would not have the power to forge themselves.[47] In other words, if the arbitrator imposed an arbitration award that was contrary to how the parties could voluntarily choose to interact, then the arbitrator was acting in manifest disregard of the contract. The court's view of manifest disregard was extremely narrow and essentially ousted manifest disregard as a non-statutory method for vacatur.

The majority was severely criticized by the minority that said this was not a manifest disregard case nor was an agency theory approach a proper analysis of manifest disregard.[48] The following is a summary of the dispute and the findings of both the majority and the minority.

A. *The Main Dispute*

The dispute arose between George Watts & Son and Tiffany & Company. Watts was a long-time distributor for Tiffany products.[49] Tiffany

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[44] Flanagan, *supra* note 10, at 491.

[45] *Id.* (quoting Chameleon Dental Prod. Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991)).

[46] *Id.* (citing Eljer Mfg. Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1255 (7th Cir. 1994)).

[47] *See* George Watts & Son v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001).

[48] *Id.* at 581–85.

[49] *Id.* at 577.

had officially terminated the relationship through a formal, written notice, and Watts responded by filing suit alleging that Tiffany was in violation of the contract and in violation of the Wisconsin Fair Dealership Law (WFDL).[50] Both parties decided to take their case to arbitration rather than pursue litigation since arbitration was less expensive and timelier.[51]

The arbitrator's award provided for an extension of time "during which Watts could resell Tiffany's merchandise through Watts' bridal registry but permitted Tiffany to cease selling to Watts at the end of 2000; it also required Tiffany to repurchase at retail price all other Tiffany merchandise remaining in Watts' inventory."[52] The one thing that the arbitration order did not provide was for Tiffany to pay Watts' attorney fees and costs.[53] Watts charged that the arbitrator's failure to award attorney fees and costs was a departure from Wisconsin law, thus "requiring the courts to repair the problem."[54] Watts brought the case to federal court charging that the arbitrator was in error in not granting attorney fees, which was a violation of the WFDL. The trial court upheld the arbitrator's decision and Watts appealed.

B. *Seventh Circuit's Application of Manifest Disregard*

With the advent of the *Watts* case, the Seventh Circuit once again was called upon to determine the definition of manifest disregard. One of the first questions that needed to be answered was whether the arbitrator's failure to award Watts his attorney fees represented a statutory violation of the law or whether it was a non-statutory violation. It was Watts' contention that the arbitrator was in violation of the WFDL by its failure to award Watts his attorney fees. Judge Easterbrook, writing for the majority, noted that legal error was not listed as grounds for vacating or modifying an award that is under the purview of 9 U.S.C. §§10–11, although Section 10(a)(4) does state that an arbitration award may be vacated "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

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[50] WIS. STAT. § 135.06 (2000).

> If any grantor violates this chapter, a dealer may bring an action against such grantor in any court of competent jurisdiction for damages sustained by the dealer as a consequence of the grantor's violation, together with the actual costs of the action, including reasonable actual attorney fees, and the dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances.

[51] *See Watts*, 248 F.3d at 578.

[52] *Id.*

[53] *Id.*

[54] *Id.*

definite award upon the subject matter submitted was not made."[55] If the arbitrator was in violation of section 10(a)(4), then the court had clear jurisdiction to vacate the award, but this was not the case here.

The court explained that the parties had never agreed that Wisconsin law would be determinative in this case, so the arbitrator could not have willfully disregarded the state statute. If they had agreed that Wisconsin law would be determinative, clearly the arbitrator's failure to follow that law, as well as his preference or use of New York law, would constitute manifest disregard.[56] The court, therefore, had to look to non-statutory grounds for vacatur. Specifically, the court examined whether there were "broader, extra-statutory principles authorizing courts to review arbitrators' legal rulings, or the legal assumptions that influence their decisions even if not identified as conclusions of law."[57] It was acknowledged that the dicta in *Wilko* provided a non-statutory basis for judicial review if an arbitrator exhibited a manifest disregard of legal rules, i.e., legal error.[58]

So what does this mean? Does it mean that any legal error could constitute manifest disregard? The Seventh Circuit did not exhibit any consistency in how it approached non-statutory issues of manifest disregard. It was not clear from previous decisions as to what kind of legal error is necessary to constitute manifest disregard, so the court went through a series of analytic steps to determine whether manifest disregard might be committed if the arbitrator had committed any type of legal error. Such an error might be thought of as "simple" legal error. In other words, if the arbitrator made an error of law—i.e., not applying Wisconsin law—then the arbitrator committed a legal error and the resulting decision would be a manifest disregard of the law.[59] This was the foundation for Watts' claim. Since the arbitration award contained terms that could be construed as being most favorable to Watts, then Watts could be seen as the prevailing party. Since the WFDL stated that attorney fees were to be paid by the non-prevailing party, then the arbitrator was in error for not ordering Tiffany to pay Watts' attorney fees.[60]

If the court were to adopt the position that a legal error was evidence of manifest disregard, then future arbitration agreements would be open for review. The implications of this position caused the court great concern. To say that *any* legal error might result in the vacatur of the arbitration award

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[55] *Id.* at 578–79 (quoting Federal Arbitration Act, 9 U.S.C. § 10(a)(4) (2000)).

[56] *See id.* at 578–79.

[57] *Id.* at 579.

[58] *See id.*

[59] *See id.*

[60] *Id.*

produce precarious and possibly undesirable results in the future. In particular, the court recognized that if they adopted this interpretation, then no arbitration award would ever be final and the courts would be forever reviewing what was once unreviewable. Every disgruntled party would bring suit trying to vacate the award. In the court's eyes, this would defeat the very reasons that arbitration is used in the first place—to provide a quick, inexpensive and conclusive resolution of the dispute.[61]

Perhaps the answer was to require a more egregious error than just merely ignoring existing law. The court posited that perhaps the answer was not that any legal error had been committed, but that "clear" legal error was committed.[62] Although the court did not attempt to define what constituted "clear" error versus simple legal error, the distinction still did not yield satisfactory results and did not remove the fear that arbitration awards would always be subject to judicial review. In fact, the post-award litigation might involve a more complex legal analysis. The determination of clear legal error would involve judgment as to how extensive the legal error must be to constitute "clear" error.[63] So, in each case, the law would have to be carefully scrutinized to determine how blatant the error must be to constitute manifest disregard.[64] For example, *Watts* is saying that Wisconsin law controls whether attorney fees are covered, but the issue that would have to be decided is whether the law provides for mandatory payment or rather just permits the fees to be paid.[65]

The court concluded that neither approach is correct. Legal error—whether clear or simple—is not sufficient grounds for a judicial review of the arbitration award. Rather, the proper question is whether the arbitrator interpreted the contract.

> [T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.[66]

Interpreting the contract simply means that the arbitrator examined the words of the contract in light of the dispute at hand. That language, in essence, is the "law" which helps determine the resolution of the dispute. If

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[61] *Id.*

[62] *See id.*

[63] *Id.*

[64] *Id.* (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399–405 (1990)).

[65] *Id.*

[66] *Id.* (quoting Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1194–95 (7th Cir. 1987)).

the dispute is outside of the "law" of the contract, then the arbitrator has acted in manifest disregard of the contract, and the federal court may intervene. However, if judicial intervention is mandated, the relationship between arbitrators and judges established in the *Steelworker's Trilogy*[67] will be broken.[68]

Obviously, there was no clear answer as to how the court should interpret the doctrine. The court tried to resolve its dilemma by examining how the *Wilko* dicta had been applied in previous cases. The outcomes of various cases were mixed.[69] In some cases, the arbitration award was put aside when the arbitrator treated the law as an obstacle to reaching another preferred result on other grounds.[70] Still other cases have found the opposite result—that arbitrators were not obligated to apply any rules of law which were outside of the parties' agreement.[71]

Several of the Seventh Circuit decisions, such as *Koveleskie v. SBC Capital Markets, Inc.*,[72] reaffirmed the idea that manifest disregard is a

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[67] United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960).

[68] *See Watts*, 248 F.3d at 579.

[69] *See id.* at 579–80

[70] *Id.* at 580 (citing Nat'l Wrecking Co. v. Local 731, Int'l Bhd. of Teamsters, 990 F.2d 957 (7th Cir. 1993); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253 (7th Cir. 1992)).

[71] *Id.* (citing Baravati v. Josephthal, Lyon & Ross Inc., 28 F.3d 704 (7th Cir. 1994); Flender Corp. v. Techna-Quip Co., 953 F.2d 273 (7th Cir. 1992); Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223 (7th Cir. 1991)).

[72] Koveleskie v. SBC Capital Mkts., 167 F.3d 361, 366 (7th Cir. 1999). *See also* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) ("[T]he court will set that decision aside only in very unusual circumstances."); Nat'l Wrecking Co. v. Teamsters, 990 F.2d 957, 961 (7th Cir. 1993) ("In order for a federal court to vacate an arbitration award for manifest disregard of the law, the party challenging the award must demonstrate that the arbitrator deliberately disregarded what the arbitrator knew to be the law in order to reach a particular result"); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992) ("In any event, to vacate an arbitration award for manifest disregard of the law, there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."). *But see* Baravati v. Josephthal, Lyon & Ross, 28 F.3d 704, 706 (7th Cir. 1994) ("The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at non-statutory supplementation."); Flender Corp. v. Techna-Quip Co., 953 F.2d 273, 279 (7th Cir. 1992) ("[I]f we determine that the arbitrator clearly went beyond the terms of the contract to reach the outcome indicated in his opinion, we will set aside and vacate an arbitration award."); Chameleon Dental

recognized non-statutory way of vacating an arbitration award.[73] The court may have settled the question as to whether the federal court had a basis to review the case, but it was still left with the problem of clarifying the vague dicta in *Wilko*. The court had failed to clarify the dicta even when it was used in later decisions such as *First Options of Chicago, Inc. v. Kaplan*.[74] The *Watts* court was determined to shed light on the ambiguity and to do so in such a way where the roles of the arbitrator and the role of the federal court would not be unnecessarily intertwined. It was determined that arbitrators are the agents of the parties and as such, they could do anything that the parties could do *except* directly order the parties to violate the law.[75] If the arbitrator did that through his decision, this would be a clear example of manifest disregard. Since the arbitrator is the parties' agent, the arbitrators may do anything that the parties may do directly.[76]

C. *The* Eastern *Decision and Manifest Disregard*

The *Watts* court relied heavily on the analysis used in *Eastern Associated Coal v. United Mine Workers*[77] to resolve the definitional issue of manifest disregard. *Eastern* was seen as a case very similar to that of *Watts*.[78] The *Watts* court felt that the point of similarity was that in both cases "what the parties may do, the arbitrator as their mutual agent may do."[79] This viewpoint would allow for a great deal of deference to the arbitrator's decision and would permit judicial review in only a small number of circumstances.[80] *Eastern* was illustrative of whether an arbitrator could order the employer to reinstate a truck driver who had twice failed a drug test. The company went to federal court to vacate the arbitration award stating that the arbitrator's award was contrary to public policy—another form of legal disregard as represented by public policy.[81] The arbitrator had concluded the

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Prods., Inc. v. Jackson, 925 F.2d 223, 225 (7th Cir. 1991) ("When asked to set aside an arbitration award, our review is restricted to determining whether the arbitrator actually interpreted the contract.").

[73] *See id.* at 366.

[74] See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

[75] *See Watts*, 248 F.3d at 580.

[76] *Id.* (citing E. Associated Coal Corp. v. United Mine Workers of Am. Dist. 17, 531 U.S. 57, 62 (2000)).

[77] E. Associated Coal Corp. v. United Mine Workers of Am. dist. 17, 531 U.S. 57 (2000).

[78] *Watts*, 248 F.3d at 580–81.

[79] *Id.* at 581.

[80] *See id.* at 579.

[81] *See id.* at 580.

termination was not for "just cause" and ordered reinstatement. Eastern brought suit in district court, but the district court affirmed the award saying that it was not against the public policy prohibiting drug use on safety-related occupations.[82] The Fourth Circuit agreed saying that a collective bargaining agreement grants the arbitrator certain authority, which is contained within the terms of the agreement. As long as the collective bargaining agreement itself is not contrary to public policy, then the actions of the arbitrator are not in manifest disregard of the law.[83] The court had the responsibility to determine whether the agreement violated public policy.[84]

The court concluded that although arbitrators may not order the parties to violate the law, they have discretion to choose a variety of arbitral outcomes when the law allows for compromise. In *Eastern*, the Supreme Court explained by saying that since reinstatement was within the employer's discretion, the arbitrator, acting as the employer's agent, could also permissibly order the reinstatement. In other words, the Supreme Court assumed that reinstatement was within the bounds of what was allowed in the contract; therefore, the arbitrator, who is contractually vested with the authority to interpret that contract, must have acted appropriately.[85] If there was no actual prohibition by the law, then the Court had to assess whether there was clear public policy that specifically would have prohibited the reinstatement.

The Supreme Court cautioned that the public policy exception must meet very specific criteria.[86] An assessment of public policy in this particular case involved looking at existing laws and how those laws were put into practice. If a federal rule existed that prohibited the employment of a drug-using truck driver, then the arbitrator would have essentially been ordering the parties to violate the law by reinstating him. That action would constitute a manifest disregard of the law. Eastern asserted that there was a public policy issue at stake that could be easily discerned by examining the relevant law, the

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[82] *Eastern*, 531 U.S. at 61.

[83] *Id.* at 62. *See* W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983).

[84] *Eastern*, 531 U.S. at 62.

[85] *Id.* at 61–62. *See* United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960).

[86] W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983). The Court stated that any public policy must be "explicit," "well defined," and "dominant." The court should not have to ascertain public opinion on a policy issue, rather the policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, (1987); Muschany v. United States, 324 U.S. 49, 66 (1945)).

Omnibus Transportation Employee Testing Act of 1991 (Act) and the Department of Transportation's (DOT) implementing regulations.[87] While there did seem to be a strong prohibition against drug use among public transportation workers, the Act also emphasizes the rehabilitative aspects of drug use. Bearing this in mind, the Court stated that there was no prohibition on reinstatement of an offender and seemed to imply that there was an overriding duty to do so.[88] Therefore, the arbitrator's decision was consistent with public policy, and there was no manifest disregard of the law.

The *Eastern* decision viewed the "manifest disregard" doctrine as representing one of two things: "an arbitral order requiring the parties to violate the law (as by employing unlicensed truck drivers), and an arbitral order that does not adhere to the legal principles specified by contract, and hence unenforceable under § 10(a)(4)."[89] The court used the *Eastern* standard in deciding *Watts*, but concluded that neither of the two examples of manifest disregard applied.[90]

D. *Analysis of* Watts

Since the court took the *Eastern* approach in analyzing the facts in *Watts,* the first step was to examine whether there was anything in Wisconsin law to prevent the parties from coming to a similar agreement that had been contained in the arbitration agreement. There was no actual language in Wisconsin law that prohibited the parties from assuming their own legal fees.[91] The court reasoned that since there was no legal prohibition, the arbitrator was within his power in refusing to grant attorney fees to Watts. Furthermore, the award did not require either Watts or Tiffany to violate Wisconsin state law.[92] Since nothing in the law prevented the parties from assuming their own attorney fees, then, as in *Eastern*, the arbitrator was allowed to render an award requiring each party to shoulder the burden of its own attorney fees.[93] If the parties wished to place limitations on what the arbitrator could do, they could always do so through a contract. For example, the parties could have adopted the "no split" rule, in which the arbitrator would be prohibited from splitting the difference of the costs.[94] Then, if the

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[87] *Eastern*, 531 U.S. at 63.

[88] *See id.* at 63–66.

[89] George Watts & Son v. Tiffany & Co., 248 F.3d 577, 581 (7th Cir. 2001).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

arbitrator had rendered the same decision whereby the parties pay their own attorney fees, the arbitrator would have been acting beyond his scope of authority as outlined in the contract. The issue would then fall under 9 U.S.C. § 10(a)(4).[95] If the arbitrator did not disregard the parties' contract, direct them to violate the law, or overstep his authority under the arbitration agreement, the trial court may properly enforced the award as written. Such was the case in *Watts*. Thus, the court effectively rejected the manifest disregard doctrine by adopting the *Eastern* standard that allowed the arbitrator to do whatever the parties could.[96]

Since the arbitrator "did not disregard the parties' contract, did not direct them to violate the law, and did not otherwise overstep the terms of his engagement," the arbitrator did not demonstrate a manifest disregard of the law.[97] The court affirmed the lower court's decision.

E. *Criticism by the Concurrence*

Judge Williams, concurring only on the judgment, sharply criticized the court's analysis, saying that there was no need to address the manifest disregard doctrine since this was not a manifest disregard case.[98] Williams contended the court compounded its error by rejecting the doctrine.[99] The majority had claimed that the history of circuit court opinions in the Seventh Circuit demonstrated a notable lack of consistency in how the court defined manifest disregard. There was some evidence that the doctrine had been interpreted and utilized in a consistent manner among the federal district courts.[100] Manifest disregard was a concept requiring that (1) the arbitrator

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *See id.*

[100] Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 28 (2d Cir. 2000); Health Servs. Mgt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992). In *Greenberg*, the appellant, an investor, charged that the brokerage firm was engaged in fraudulent activities in violation of federal and state laws committed by Sterling Foster, an employee of Bear Sterns. *Greenberg*, 220 F.3d at 24–25. The arbitrator found for Bear Stearns, and Greenberg claimed that the arbitrator's decision was in manifest disregard of the law. Greenberg requested that the federal court vacate the award. *Id.* at 25. The district court denied the petition, but the court of appeals found no manifest disregard since the arbitrator's interpretation of the law was reasonable. The court made note of the importance of the case by stating:

> This appeal squarely presents the question of whether and under what circumstances federal courts have jurisdiction to hear motions to vacate arbitration

knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well-defined, explicit and clearly applicable to the case.[101] The burden of proof to demonstrate whether one of the two definitions applies falls on the party bringing the action.[102] If manifest disregard forms a major part of the petitioner's claim and that claim is in good faith, the federal question becomes substantial enough to warrant the court's intervention.[103] "Federal courts have a strong interest in ensuring that arbitrators interpret and apply federal law properly."[104]

Watts met those criteria for review by the federal court, but the way in which the *Watts* majority analyzed manifest disregard turned a once consistent doctrine into an inconsistent doctrine. Williams claims all the circuit courts had adopted the two-part definition, and no inconsistency in previous Seventh Circuit decisions existed. The majority's rejection of that definition was not only contrary to the interpretation used by other circuits, but was based on a trivial point—that the arbitrator may not force the parties to violate the law which was a point previously established in other cases.[105]

The court's reliance on the *Eastern* decision was improper since *Eastern* was not a manifest disregard case. The *Eastern* case involved an arbitrator who was empowered to interpret the contract based on the parties' prior collective bargaining agreement to arbitrate their case. Therefore, *Eastern* was a case involving a collective bargaining dispute and whether the arbitrator acted within his scope of authority in interpreting the contract. Williams strongly disagreed that the case demonstrated the agency theory embraced by the majority—that the arbitrator is acting as the parties' agent.[106] Rather than taking the view that the arbitrator's role was defined by agency theory, the key question was whether the arbitrator acted beyond the scope of the contractual powers granted to him by the parties' contract to

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awards. We conclude that the district court had jurisdiction in this case because Greenberg challenged the award primarily on the grounds of manifest disregard of federal law. Nevertheless, Greenberg has not met the very stringent burden of demonstrating the sort of manifest disregard required to vacate the award. Therefore, we affirm the judgment of the district court.

Id.

[101] *Id.* at 28.

[102] *Id. See also* Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997).

[103] *Greenberg*, 220 F.3d at 27.

[104] *Id.* Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 232 (1987). "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.*

[105] Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1195 (7th Cir. 1987).

[106] George Watts & Son v. Tiffany & Co., 248 F.3d 577, 584 (7th Cir. 2001).

arbitrate. If the arbitrator had acted beyond that contractual power, the agreement could be vacated for manifest disregard. Williams stated that the arbitrator is bound by the law and must adhere to legal proscriptions, unless otherwise directed by the parties' agreement.[107] Thus, manifest disregard refers only to whether the arbitrator exceeded contractual powers. The *Hill* case reiterates the importance of discerning whether the arbitrator actually interpreted the contract—not whether that interpretation was correct. *Hill* clearly stated that only if the arbitrator failed to interpret the contract could there be grounds for manifest disregard. If the arbitrator did interpret the contract, even if that interpretation is incorrect, the arbitrator is acting within the scope of his or her authority.[108] If the arbitrator must go beyond the contractual requirements and interprets statutory law, the courts require "something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law."[109] In other words, did the arbitrator know the law and yet flagrantly disregard the law? If so, the arbitrator exhibited manifest disregard and the award must be vacated.

Williams criticized the majority's assertion that the Seventh Circuit had produced conflicting case law interpretations regarding manifest disregard. Williams saw the two lines of case decisions as being complementary, not conflicting. Citing *Dawahare v. Spencer*,[110] Williams pointed to the great difficulty other circuits have encountered in determining whether there has been manifest disregard of the law, since many arbitrators do not write down their decisions.[111] When there is ample evidence of the arbitrator's manifest disregard, the courts have had little difficulty in vacating the award. Thus, the manifest disregard doctrine cannot be applied to cases without a written decision, since it is virtually impossible to determine whether an arbitrator has acted in manifest disregard of the law under those circumstances. However, when a written decision has been made, a thorough examination may commence, and the manifest doctrine analysis can be applied.

The majority's view that arbitrators are agents of the parties and empowered to order only those things that the parties themselves may do, seems at odds with the Supreme Court's notion regarding arbitration agreements. The Supreme Court has stated that arbitration agreements may dictate the forum for resolving disputes, but they are not waivers of a party's

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[107] *Id.* at 583.

[108] *Hill*, 814 F.2d at 1194-95; *see* United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960).

[109] Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992).

[110] Dawahare v. Spencer, 210 F.3d 666 (6th Cir. 2000).

[111] *Watts*, 248 F.3d at 583. The court stated, "[a]rbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law."

rights under a statute.[112] Therefore, even if there were an arbitration agreement, the parties still would not be able to instruct the arbitrator to ignore the demands of the statute. Similarly, it is unreasonable to assume that just because the parties have the ability to rescind their arbitration agreement, does not mean they can give license to the arbitrator to ignore the contract. Given these limitations, the arbitrator cannot be an agent of the parties since his power is limited. If the arbitrator exceeds those limited powers, then the court has ample reason to intervene and vacate the award. The proper analysis remains to be whether the existing laws prohibit the enforcement of the arbitrator's award.

F. *The Concurrence's Analysis of* Watts

In this case, the proper analysis is to examine whether the Wisconsin statute clearly and unambiguously mandates that the winning party receive payment of attorney fees. That burden of proof falls to the plaintiff.[113] Watts failed to meet this burden due to his inability to show that the Wisconsin law was clear and explicit in mandating attorney fees for the prevailing party.[114] The statute made no reference to the recovery of attorney fees, much less state that the recovery of fees is mandatory.

Watts did not rely just on Wisconsin law to make his case. He pointed to the decision in *Siegel v. Leer, Inc.*,[115] which provided that attorney fees provisions are an "express statutory right of a dealer to recover for a grantor's violation of the WFDL."[116] While on the surface, it may seem like the case supports Watt's position, Watts used the case out of context. In *Siegel*, the court distinguished awards of attorney fees from another case in which a court-initiated fine was found to violate public policy. Although the court stated that the right to attorney fees was expressly provided by statute, it did not hold that attorney fees are mandatory. Other cases have emphasized

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[112] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*

[113] Greenberg v. Bear, Sterns & Co., 220 F.3d 22, 28 (2d Cir. 2000).

[114] WIS. STAT. § 135.06 (2000), which states that, "[i]f any grantor violates this chapter, a dealer may bring an action against such grantor in any court of competent jurisdiction for damages sustained by the dealer as a consequence of the grantor's violation, together with the actual costs of the action, including reasonable actual attorney fees."

[115] *Watts*, 248 F.3d at 584 (citing Siegel v. Leer, Inc., 457 N.W.2d 533, 537 (Wis. Ct. App. 1990)).

[116] *Siegel*, 457 N.W.2d at 537.

that attorney fees are an entitlement, not a right.[117] Therefore, Watt's reliance on the case was misplaced.

Tiffany relied on a published commentary regarding whether attorney fees are mandatory or discretionary under the WFDL and concluded that it is still an open issue.[118] Williams tended to agree with that view, and stated that while attorney fees may be mandated in the future, the law does not currently mandate them. Tiffany further argued that there was nothing to indicate that the arbitrator relied on the Wisconsin statute.[119] Williams thought little of this position stating:

> [t]his court need not strain credulity to support an arbitral award, simply because the arbitrator did not explicitly state the grounds for her decision. There is ample evidence in the record showing that Watts abandoned its other contract claims, and that the only remaining basis under which the arbitrator could have decided this case was the WFDL. That the arbitrator may not have correctly applied the statute will not frustrate a court's review for manifest disregard of the law.[120]

Since both the statute and the doctrine of manifest disregard are clear, Williams concluded that Watts failed to make a showing that the arbitrator had engaged in manifest disregard of the statute.[121] Williams stated that although the law may be interpreted in the future to require the mandatory award of attorney fees, it was not going to decide that issue in this case. Watts failed in his attempt.

VI. CONCLUSION

The doctrine of manifest disregard has been severely limited by the Seventh Circuit. This position will not be without its critics. The court took a decidedly novel approach by characterizing manifest disregard as embodying agency theory. By doing this, it essentially destroys most vacatur actions that rely on manifest disregard unless the arbitrator has blatantly ordered the parties to disregard the law or has required the parties to perform beyond their own powers. Thus, the Seventh Circuit has posited a novel position, somewhere in between the overt rejection of the doctrine by the Eleventh

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[117] Esch v. Yazoo Mfg. Co., Inc., 510 F. Supp. 53, 58 (E.D. Wis. 1981)

[118] *Watts*, 248 F.3d at 584 (citing Andrew O. Riteris & Susan R. Robertson, *The Fair Dealership Law: Good Cause For Review*, WIS. B. BUL., Mar. 1986, at 10).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 584–85.

Circuit and the enthusiastic endorsement of the doctrine by the Second Circuit.

Even though the rationale for the decision is heavily criticized by Judge Williams, it is very likely that those courts which have a conservative interpretation of the manifest disregard doctrine will see this interpretation as one bolstering the view that arbitrators have a great deal of discretion in interpreting the contract. If the award binds the parties in a way that they could have agreed to on their own, this is a sufficient enough justification for the award without having to ponder whether the award violates the law. In this way, the *Watts* decision makes the rejection of the manifest disregard doctrine less convoluted. Courts will not need to address whether the law has been broken. Rather, they will need to determine that the two parties could have opted for the same course of action, even if that outcome is extremely unfavorable to one of the parties.

While it may be unlikely that the Second Circuit adopts the Seventh Circuit's agency approach of manifest disregard, it is highly likely that the majority of circuits will turn to it. The pendulum will swing full circle in the federal courts taking a "hands-off" attitude towards arbitration agreements, thereby reinforcing the original idea that arbitrators have very specific powers as defined by the parties. In this way, the courts will not have to exert special effort scrutinizing the evidence of the case nor in deciding whether the evidence supported the arbitrator's finding. The analysis will be merely whether the parties could have agreed to the same provisions as in the arbitration contract.

Bonnie Roach